United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL **75-7649**

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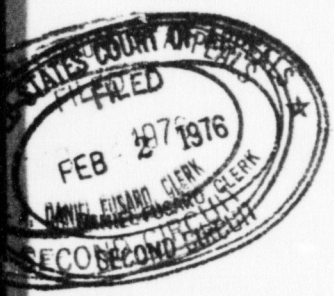

MARVIN STERN,

Plaintiff-Appellee
and
Cross-Appellant,

against

SATRA CORPORATION and
SATRA CONSULTANT CORPORATION,

Defendants-Appellants
and
Cross-Appellees.

Appeal from a Judgment of the United States District Court for the Southern District of New York

BRIEF OF DEFENDANTS-APPELLANTS SATRA CORPORATION AND SATRA CONSULTANT CORPORATION

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Preliminary Statement

Defendants-Appellants and Cross-Appellees, Satra Corporation and Satra Consultant Corporation ("Satra"), jointly submit this brief in support of their appeal from the final judgment entered by Hon. Morris E. Lasker, D.J., on October 20, 1975, after a jury trial on the issue of liability and a trial before the District Court on the issue of damages.

Statement of Issues

1. Did the District Court commit prejudicial error by refusing to charge the jury that under New York law, a party is entitled to rescind a contract induced by misrepresentations even if the misrepresentations were innocently made, without an intent to deceive?

2. In construing the terms of an agreement between Plaintiff-Respondent Marvin Stern ("Stern") and Satra (the "Stern-Satra Agreement," E6-9; E10-13),* did the District Court err by finding that Satra intended to go unreimbursed for substantial expenses incurred during its equal partnership arrangement with Stern?

3. Did the District Court err, as a matter of law, in holding that an agreement between Satra and IBM World Trade Corporation ("IBM") constituted a renewal of a previous agreement between them?

4. In connection with its rulings on the issue of mitigation of damages, was the District Court's finding that Stern was required to devote only 15% of his working hours to the Stern-Satra Agreement clearly erroneous?

Statement of the Case

Nature of the Case

This is an action for a declaratory judgment brought by Stern to determine whether certain documents exchanged by him and Satra constituted a valid and binding contract, and if so, to determine his rights thereunder. Satra defended on the grounds that (a) there was no valid and binding agreement because of the failure of the parties to reach

* References followed by the letter "A" are to the appendix on appeal; references preceded by the letter "E" are to the exhibit volume.

a meeting of the minds on a material term of the purported agreement, (b) if there was an agreement, Satra was induced to enter into such agreement by Stern's misrepresentations, thereby entitling Satra to rescind, and (c) there was a failure of consideration.

Course of Proceedings and Disposition Below

This action was filed in January 1972 against the Satra defendants to adjudicate Stern's rights under a purported agreement entered into in September 1971. In March 1973, Stern filed an amended complaint adding IBM and Ralph Stafford ("Stafford") as defendants on the theory that they wrongfully, knowingly and maliciously induced Satra to breach its purported agreement with Stern. Obviously unable to prove these claims, Stern stipulated to dismiss them with prejudice on the proverbial "eve of trial," which began on April 1, 1974. Consequently, the only issues presented to the jury were (a) whether there was a valid and binding contract, (b) if so, whether Satra was entitled to rescind such contract because of Stern's misrepresentations, and (c) whether there was a failure of consideration (832-34A; 881-82A; 887-88A; 902-03A).

After a jury verdict in favor of Stern on the issue of liability (935-36A), the issue of damages was tried before the District Court on April 17, 1974. Several questions of fact, questions of law, and mixed questions of fact and law were presented to the District Court for determination, and a final judgment was entered on October 20, 1975 ("Judgment," 61-83A). Appeals were taken from the Judgment by Stern and Satra. Stern seeks modification of the Judgment only on certain of the issues relating to damages; Satra seeks (a) reversal of the Judgment because of an error committed by the District Court in its instructions to the jury, or (b) in the absence of such relief, a remand

to the District Court for a new computation of damages because of certain errors committed by the District Court in reaching its various findings on damages.

Statement of Facts

The Parties

Satra Consultant Corporation is an organization representing major American corporations wishing to do business with the Soviet Union (537A; 675-77A). Originally, Satra was a trading company specializing in exporting American products to the Soviet Union in exchange for chrome ore and other metallurgical and industrial products (674-75A). After developing an increasingly large business with the Soviet Union and substantial expertise in transacting such business, Ara Oztemel, the founder of Satra, decided to broaden Satra's trading activities to include the business of guiding and serving large American corporations wishing to engage in their own activities in the Soviet Union (675-76A; 680A).

Although Satra's new business initially took the form of "handholding" for American executives during their travels in the Soviet Union and making other arrangements similar to those of a "travel agent" (676-77A), Satra's services soon became substantially more sophisticated. Such services included assistance in the development of new business in the Soviet Union on behalf of American corporations, assistance in consummating the unique financial requirements and commercial arrangements involved in doing business with the Soviet Union, participation in the negotiation, drafting and interpretation of contracts, interpretation of Soviet laws and regulations, and general advice on the concept of doing business with the Soviet Union (113-14A; 676-77A). In short, Satra provided a

professional service in assisting major American corporations to market their products or technology in the Soviet Union (537A).

Marvin Stern, a resident of Los Angeles, California, has a background in science, engineering and mathematics (106-07A). Although Stern had occupied several high positions in the United States government as well as in private industry prior to his introduction to Satra (107-08A), he had absolutely no experience in commercial transactions between American companies and the Soviet Union, nor was he an expert in the computer field (258-63A).

Stern's Early Relationship with Satra

Stern was first introduced to Satra in the Spring of 1971 (274A). Because of his contacts within the U.S. government and his general awareness of the "Washington scene," Stern was retained by Satra to (a) analyze the effectiveness of Satra's representation in Washington, (b) assist Satra in obtaining approval by the U.S. Department of Commerce of the Kama River truck project then being planned for the Soviet Union, and (c) assist Satra in obtaining an export license from the Department of Commerce signifying its approval of that project (109-12A; 274-87A; 542-46A; 632A; 681-82A; 799-804A).* Stern was first retained on a $500 *per diem* basis, and was ultimately paid $10,000 for his efforts in connection with the Kama River project (288A; 546A; 549A).

Stern and Satra's Introduction to IBM

During his work in connection with the Kama River project, Stern met Ambassador Llewellyn Thompson, for-

* U.S. Department of Commerce approval must be given for commercial sale and shipping to the Soviet Union of certain equipment manufactured in the United States (110-11A).

mer U.S. Ambassador to Russia, who was then a consultant to Gilbert Jones, Chairman of IBM (171-73A). In a general conversation concerning trade with the Soviet Union, Thompson advised Stern of the likelihood that IBM might "reconsider its own status and might consider . . . doing business with the Russians" (174A). Thompson suggested that after giving Thompson time to mention Stern to Jones, Stern should contact Jones personally concerning IBM's utilizing Satra as an intermediary in its efforts to enter the Soviet market (174A). Stern did so in mid-July, and after a brief telephone conversation with Jones, was told that IBM would get back to Stern after completing certain communications with Soviet officials (179-80A).

Unbeknownst to either Stern or Satra at the time, IBM had already decided to enter the Soviet market in May 1971 (646A). Gilbert Jones assigned to Ralph Stafford, formerly Managing Director of IBM's Eastern European operations, the sole responsibility for developing this new area of business for IBM (647-48A). During a conversation in late July or early August in which Stafford asked Jones for permission to investigate Satra's capabilities,* Jones gave Stafford a slip of paper with Stern's name and Satra's New York telephone number (obviously, a result of the Stern-Jones telephone conversation), and asked Stafford to contact Stern (649-51A; 663-64A). On August 6th, Stafford called Satra in New York and was given Stern's Los Angeles home telephone number (650-51A).

At this point in time, Stern got back into the picture. Stafford telephoned Stern in California to discuss (a) IBM's possible involvement in the Kama River project, (b) IBM's possible willingness to do business with the

* Stafford had previously learned of Satra and Oztemel that summer when one of his associates gave him an article describing Satra's involvement in the Kama River project (648-49A; E80-81).

Soviet Union "across the board," and (c) IBM's possible use of an intermediary in these efforts (183-84A). Stafford requested, and Stern arranged, a conference in New York to discuss these points (184-85A). This conference was conducted on August 10th, and was attended by Stern, Oztemel and Stafford (185-88A).

Formulation of the Stern-Satra Relationship

On the evening of August 10th (the very day that Stern had produced an IBM representative who demonstrated IBM's interest in dealing with the Soviet Union and in utilizing Satra as its intermediary), Stern and Oztemel had the first discussion concerning a broadening of their existing relationship which resulted in a draft agreement (119-22A). Stern prepared a draft partnership agreement providing that Stern and Satra would use their "joint best efforts" to represent U.S. companies in the Soviet Union, in exchange for which Stern would receive a monthly fee (E1-2). This latter provision was included to alleviate Stern's fear, previously expressed to Oztemel, that a pure partnership would not provide him with the current income he needed to support his family (121A; 320A).

As the seriousness of IBM's interest in trading with the Soviet Union and utilizing Satra as an intermediary became more apparent, so too did the seriousness of Stern's negotiations with Satra concerning the terms of their proposed relationship. Indeed, throughout the period of his negotiations with Satra, Stern so dramatized his role in retaining IBM as a client for Satra and in servicing the contemplated IBM-Satra agreement that those became the factors which induced Satra to continue its efforts to reach an agreement with Stern. Stern told various Satra representatives that he had substantial contacts and influence with IBM, that he could influence IBM's decision to enter

the Soviet market, that he could convince IBM to retain Satra as its intermediary, and that without Stern's participation in the proposed IBM-Satra relationship, IBM would not consider using Satra as its intermediary (455-56A; 461-62A; 554A; 565-66A; 573A; 600A; 764A). More specifically, Stern stated that IBM was interested in Satra because of Stern's systems management capability, technical knowledge of computer software, and technical competence which was not otherwise present in the Satra organization (455-56A; 462A; 566A; 573A; 764A). Further, in order to cement his role in the Satra-IBM relationship, Stern attempted to isolate Satra's personnel from the IBM negotiations by telling them that they should "stay away" from IBM, that they should not negotiate with IBM representatives without his participation, that IBM would not independently deal with Satra and that without Stern's presence, IBM would not pursue the negotiations (455-56A; 565-66A; 634A; 710A).

It was these representations and actions by Stern which induced Satra to persevere in negotiating, and in ultimately consummating, their agreement with Stern.

Consummation of the Stern-Satra Agreement

The end of August saw Stern and Satra approach the conclusion of their negotiations. According to Stern, Satra extended an offer on August 25th calling for (a) a pure 50-50 arrangement with no annual salary, or (b) payment to Stern of $7,500 per month plus a percentage of gross income received from individual projects participated in by Stern and Satra, including 25% of the revenues from the contemplated IBM agreement (130-39A; E3-5). Stern returned to Los Angeles to decide whether or not he could obtain sufficient funds on which to live from other sources

so as to enable him to accept the pure 50-50 offer (135-40A). Stern then testified that having decided he could *not* obtain such funds, he telephoned Oztemel on August 28th and accepted the $7,500 per month-25% offer (140-41A).

Upon Stern's return to New York on August 30th, there ensued additional conversations concerning Stern's relationship with Satra. On the morning of August 31st, Stern, Hanno Mott (Satra's attorney) and William Herman (Satra's accountant) discussed the fact that Satra would necessarily incur heavy expenses in servicing the IBM account, and that the August 25th offer should be amended to allow Satra to be reimbursed for those expenses (142-43A; 469A). (The expenses included, *inter alia*, the costs of office space, experienced interpreters, arranging appointments, obtaining visas and making introductions to Soviet officials. E25-33; E104-113.) Stern testified that he stated that to allow Satra to be reimbursed for actual expenses would require Stern to audit Satra's books (143A). To avoid that exercise, Stern and Satra first estimated Satra's anticipated expenses in servicing the IBM account. The base amount of those expenses was estimated at $100,000 per year; the expenses were expected to increase as IBM's sales to the Soviets increased (472A; 520-21A; 531A).* Using their derived figures, Stern, Mott and Herman prepared a schedule of expenses to be substituted for the actual expenses which Satra would incur in servicing the IBM account ("Expense Schedule"). Satra would then be reimbursed for the expenses set forth on the Expense Schedule out of revenues received from IBM (144-45A; 469-72A).

Not certain whether he was willing to accept this latest offer, Stern reserved to speak to Oztemel later that after-

* In fact, Satra's expenses turned out to be substantially higher than Satra had anticipated, *i.e.* $400,000 for the first two years of the IBM account (E100-103).

noon (149A). That conversation included a discussion of the Expense Schedule and Satra's need to be reimbursed for the extensive overhead which Satra would incur by servicing an organization as large as IBM (702-03A). Ultimately, Oztemel offered Stern alternative proposals: (a) a "pure 50-50 partnership" applicable to the IBM deal burdened only by the Expense Schedule (which had been drafted that morning in connection with the $7,500 per month-25% offer), or (b) $6,250 per month plus 30% of the revenues received from IBM after deduction of expenses (155A).

After the alternative offers were memorialized in an unsigned writing (155-57A; E6-9 [with the exception of the handwritten phrase on the Expense Schedule]), Stern continued the conversation with Oztemel. Knowing that he would not be able to obtain income from other sources, Stern expressed his reluctance in accepting the 50-50 arrangement accompanied by the Expense Schedule because he feared such terms would not provide him with any current income to support himself and his family (157-58A; 708A). He continued that as the normal arrangement between Satra and its clients contemplated Satra's receipt of both future income and immediate retainers, Stern did not want the Expense Schedule to apply to retainers to be received from IBM (158-59A; 708A). This would satisfy Stern's need for current income for living purposes and would still allow Satra to be reimbursed for expenses out of future income. Oztemel indicated his agreement to this concept by adding the following phrase to the Expense Schedule attached to the August 31st offer and by signing his name below the handwritten addendum:

> "In alternate one (I) any retainers received will be divided 50-50. Other income as above schedule." (159A; E9)

Therefore, Stern ultimately received an offer in connection with the IBM project of (a) a 50-50 sharing arrangement, less deductions for expenses *from future income only,* or (b) $6,250 per month plus 30% of revenues received from IBM after deductions for expenses (E6-9). Stern considered the offer and accepted Alternative I (*i.e.* the 50-50 arrangement) by forwarding a handwritten memorandum to Oztemel the following day (168A; E10-11).

Consummation of the Satra-IBM Agreement

Subsequent to the finalization of their own agreement, Stern and Satra both pursued the contemplated agreement with IBM. Conferences with IBM were held throughout September, culminating in an agreement executed by IBM and Satra as of September 22, 1971 (the "1971 IBM Agreement") (E25-33).

The services to be provided by Satra under the 1971 IBM Agreement ran the gamut of sophistication from sole responsibility for arranging and consummating the unique financial transactions involved in dealing with the Soviets (Paragraph IH, E28), and responsibility for recommending an approved sales program by advising, *inter alia,* as to Soviet legal requirements, the need for data processing equipment in the Soviet Union and local technical capability and resources (Paragraphs IA, D and F, E26-8), to providing administrative services and office space and assisting in meeting visa requirements (Paragraphs IB, C and E, E27).

Satra's compensation for its services was to be 3½% of revenues received by IBM from the Soviet Union (Paragraph IIA, E29). Two payments of $25,000 each were to be made (one immediately and one in ninety days), to be charged against future commissions when such became owing to Satra (Paragraph IIB, E29). The agreement was to run for five years (*i.e.* through September

20, 1976), although it was terminable by IBM after three years (*i.e.* September 20, 1974) if IBM's annual sales to the Soviet Union did not exceed $50 million by that time (Paragraph IIIA, E30).

Satra's Discovery of the Falsity of Stern's Representations and the Termination of Their Relationship

Subsequent to the execution of their agreement, Satra and IBM pursued their mutual interests and attempted to effectuate sales of IBM equipment in the Soviet Union. These efforts frequently took Satra and IBM personnel to the Soviet Union, and it was during one such trip that Satra became aware of the falsity of Stern's representations concerning his influence at IBM and the necessity of his involvement in any successful Satra IBM relationship.

During a dinner conversation in Leningrad between James Giffen, President of Satra Consultant Corporation (537A),* and Ralph Stafford, Giffen became quite surprised when he learned that contrary to being influential in IBM, Stern was considered by IBM only to be another employee of Satra (592A; 666A).** Giffen learned (a) that Stern did not influence IBM in its decision to enter the Soviet market, (b) that Stern did not convince IBM to utilize Satra as its intermediary, (c) that Stern was not "close" to IBM, and (d) that IBM did not consider Stern necessary to a successful relationship between Satra and IBM (591-93A).

Shocked at the facts which had been uncovered during his conversation with Stafford, Giffen arranged to have Stafford repeat their discussion to Oztemel in London (593-94A; 720-21A). Recognizing that Stern had made some

* Giffen was an attorney and author of *The Legal and Practical Aspects of Trade with the Soviet Union.*

** Only a few weeks earlier Stafford himself had been quite surprised to learn from Stern in Moscow that Stern was *not* an employee of Satra, but rather their joint venturer with a "piece of the action" (661A).

contribution in obtaining IBM as a client even though he had misrepresented his situation, Oztemel rescinded the Stern-Satra agreement and offered Stern $100,000 in lieu thereof (723-24A). This was rejected by Stern, and the Stern-Satra relationship, which had been based on Stern's purported relationship with IBM and his purported necessity to a successful IBM-Satra relationship, was terminated.

The 1973 IBM Agreement

After dealing with the Soviet Union for a period of time, IBM grew unhappy with certain aspects of its agreement with Satra. IBM's basic interest in utilizing Satra as its intermediary was Satra's ability to conduct barter or similar financial transactions arising out of IBM's sales to the Soviet Union (981-82A). IBM therefore entered its agreement with Satra primarily to receive financial assistance in barter arrangements, and secondarily to be provided with administrative services (982-83A). Satra was to receive a fee for all services rendered in the form of a percentage of IBM's sales to the Soviet Union (982-83A).

As IBM began to deal with the Soviet Union, it realized that barter transactions played a non-existent role in its transactions with the Russians (985A). This caused dissatisfaction within IBM, for it had agreed to pay Satra 3½% of all sales to Russia basically as a commission for barter transactions when, in fact, there were no barter transactions in the offing (985A). Furthermore, IBM learned that Satra was providing administrative services to an extent far beyond that ever envisioned by IBM, undoubtedly with substantial expenses for which Satra was not being compensated (986-87A; E104-13).

As IBM was unhappy with the terms of its relationship with Satra, as it thought Satra might be similarly dissatis-

fied, and as IBM was legally bound under the 1971 IBM Agreement until at least September 1974 (985A), IBM proposed to Satra that they enter into a new agreement (988-89A).* After much negotiation, the 1971 IBM Agreement was terminated and a new agreement was executed (the "1973 IBM Agreement"), whereby Satra's providing administrative services took on primary importance and its assistance in barter transactions was relegated to secondary status (988-93A; E39-46).

Under the 1973 IBM Agreement, Satra was to receive a monthly fee of $16,667 solely for administrative services, a monthly payment of $9,350 in fulfillment of a commission obligation under the 1971 IBM Agreement (subject to refund to IBM if the transaction giving rise to the obligation was not approved by the Department of Commerce), and a right of first refusal on possible barter transactions (990-93A; E41-2). The 1973 IBM Agreement was indefinite in duration, terminable by either party after February 1, 1977 upon proper notice (E44-5).

Satra and IBM have been performing their obligations under the 1973 IBM Agreement to the present time.

ARGUMENT

POINT I

The District Court Erred by Incorrectly Instructing the Jury on the New York Law of Rescission.

At the very heart of one of Satra's defenses in this action was its inducement to enter into the Stern-Satra Agreement because of Stern's misrepresentations concerning his influence with IBM and the necessity of his partici-

* IBM made this suggestion even though it had concluded it would be able to cancel the 1971 IBM Agreement in September 1974 (485A).

pating in any relationship between Satra and IBM. In addition to requesting that the jury be instructed on the New York law of rescission based on fraudulent misrepresentation, Satra requested the District Court to charge that under New York law, Satra was entitled to rescind the agreement with Stern even if Stern made the misrepresentations in question without an intent to deceive. In other words, "innocent" misrepresentations would have been sufficient to have allowed Satra to rescind its agreement (26-7A). However, the District Court refused to so instruct the jury (885-86A) (to which Satra properly preserved its exception [886A; 930A]), thereby committing a highly prejudicial error requiring a reversal of the jury's verdict and a new trial below.

The law of New York is long settled that a party may rescind a contract induced by innocent misrepresentations made without an intent to deceive. *Seneca Wire and Manufacturing Company* v. *A. B. Leach & Company, Inc.*, 247 N.Y. 1, 159 N.E. 700 (1928); *Bloomquist* v. *Farson*, 22 N.Y. 375, 118 N.E. 855 (1918). The only elements necessary to establish a right to rescind for "innocent misrepresentation" are that misrepresentations were made, and that they were material and influenced the bargain. *Bloomquist* v. *Farson, supra* at 380, 118 N.E. at 856. Although there clearly was sufficient evidence in the record to establish all of these elements, the District Court refused to instruct the jury on this aspect of the law. Instead, the District Court misstated Satra's defense and charged that Satra could only rescind if it proved fraudulent misrepresentation, *i.e.* an intent to deceive. For example:

> "The second contention of Satra is that even if you find that Plaintiff's Exhibit C and Plaintiff's Exhibit D did constitute a valid and binding contract, Dr. Stern is nevertheless not entitled to recover because, says

> Satra, he brought about the agreement between himself and Satra by what Satra claims was misrepresentation or fraud." (902-03A)

In outlining the elements required for Satra to succeed, the Court told the jury that Satra must prove

> ". . . that Dr. Stern knew that . . . [the misrepresentations] were false, or not true;" (904-05A)

In further explaining this element of proof, the Court instructed as follows:

> "Tne next question you must decide is whether, if you find that Dr. Stern did make misrepresentations of material facts, *he made them intending to deceive Satra.*" (Emphasis added) (906A)

In no instance did the District Court instruct the jury that it could find for Satra even if the jury concluded that Stern's misrepresentations were made without an intent to deceive. Its failure to do so was not caused by a lack of awareness of Satra's view of the law (26-7A). In spite of Satra's request, the District Court ruled as follows:

> "I find [the requested charge] not to be applicable because I do not find sufficient evidence in the record to support the implication or suggestion that if Dr. Stern made a misrepresentation it was made innocently, so to speak, or without intent to deceive." (885A)

The Court's reasoning, however, is not borne out by logic. Proof of fraudulent misrepresentation, or an intent to deceive, is a much greater burden than merely proving that a false statement was made and that it influenced the bargain. If the District Court found sufficient evidence in the record to instruct the jury on fraud, *a fortiori* there must have been sufficient evidence to support a charge of

innocent misrepresentation.* Indeed, the evidence on these two ultimate findings is the same—whether a given set of facts establishes either fraudulent or innocent misrepresentation is within the province of the jury to decide by analyzing its view of the state of mind of the misrepresenter of fact. As stated previously, all that must be shown to establish the defense of "innocent misrepresentation" is that "the proof establishes misrepresentations [were made] and that these are material, influencing the bargain." *Bloomquist* v. *Farson, supra* at 380, 118 N.E. at 856. The record in this case establishes that such a showing has been made, but the jury was prevented from so finding because of the District Court's error.

It should be indisputable that the District Court's failure to charge as requested is so highly prejudicial as to require reversal of the jury's verdict. Proof of fraud imposes a much higher burden on Satra than merely proof that Stern made a misrepresentation without regard to his state of mind or intent. Indeed, from the very outset of the trial, Stern's counsel hammered away that this case turned on a "moral" question—was Stern "a liar or a cheat?" (104-05A). This provocative approach clearly fanned the emotions of the jury and emphasized the degree of culpability Satra had to prove before it could succeed. So too did the District Court's prejudicial use of the word "fraud" in open court (*e.g.* 558A). Removing the requirement of proof of fraud would have removed what was posed to the jury as a critical element of Satra's defense, an element absent which Satra could not prevail. Under these circumstances, where the jury was entitled to find for Satra absent a finding of fraud but was not permitted to do so,

* The District Court's error can be analogized to instructing a jury on the law of gross negligence without charging on the law of simple negligence.

a highly prejudicial error was committed and should be rectified by this Court.

The District Court compounded its error by confusing the jury on the difference between liability for misrepresenting a fact and stating an opinion. After the District Court had completed its basic charge, the following occurred:

> "JUROR No. 5: Another thing that I am a little confused on is this: In terms of misrepresenting the facts as opposed to misrepresenting opinion, *if I allege that this bannister is over six feet tall, I am misrepresenting a fact. If I allege that it is the best bannister I have ever seen, is that misrepresenting a fact or an opinion or—*"
>
> THE COURT: I don't think that it would be proper for me to try and specify for you an example there. I have tried to give you the rule of law. We can't always make a compartment watertight and you'll have to use your judgment as to whether, in case you find there was any misrepresentation, it was a misrepresentation of fact or whether you believe that Dr. Stern was merely expressing an opinion.
>
> *I believe that you understand,* ladies and gentlemen, because this subject seems to me to be very close to lay experience, or ordinary experience, *the difference between deliberately telling somebody an untruth or merely expressing an opinion which you don't believe —how can I put it?—in which there is no deliberate intention to misrepresent.*" (Emphasis added) (915-16A)

By its response, the District Court misled the jury in two respects: (a) it incorrectly and prejudicially told the jury that expressing an opinion in which one does not believe does not constitute a deliberate intention to deceive and is therefore not actionable, *Hickey* v. *Morrell,* 102 N.Y. 454, 462-63, 7 N.E. 321, 324-25 (1886), and (b)

it again excluded from the jury's consideration the situation where Stern stated an untruth without a deliberate intention to misrepresent, in which case New York law entitles Satra to prevail. This "double error" exaggerated the effect of the Court's original failure to properly instruct the jury, made that error even more prejudicial, and clearly requires a reversal of the Judgment.

POINT II

The District Court Improperly Construed the Stern-Satra Agreement and the Operation of the Expense Schedule by Finding That Satra Intended to Go Unreimbursed for Substantial Expenses Incurred During Its Equal Partnership Arrangement With Stern.

One of the findings required to be made by the District Court in awarding damages was the method by which the Stern-Satra Agreement provided for the deduction of expenses from revenues received by Satra from IBM prior to the distribution of those revenues to Stern. Specifically, the Court was required to resolve two disputed issues: (a) whether expenses were to be deducted on a cumulative or non-cumulative basis; and (b) whether expenses were to be deducted "off-the-top" or on a *pro rata* basis.

In deciding these issues, the District Court violated three basic principles of law applicable to the construction of contracts: (1) the Court ignored the language of the Stern-Satra Agreement in ascertaining the intention of the parties; (2) in going beyond the language of the Stern-Satra Agreement to determine the parties' intentions, the Court erred by relying on only *one* conversation between Stern and Satra's representatives instead of by examining *all* of the circumstances leading to the execution of the contract; and (3) the District Court disregarded the principle of law that in construing a contract, a court should

avoid unreasonable results and should not give one party unfair advantage over another. Proper application of these principles of law should result in this Court's interpreting the Stern-Satra Agreement in a manner consistent with Satra's position in this appeal.*

A. The Contentions of the Parties

1. Cumulative vs. Non-Cumulative

Satra contended below that as it was estimated that Satra would incur annual expenses of approximately $100,000 in servicing the IBM account, and as the Stern-Satra Agreement and the Expense Schedule were designed to allow Satra to be reimbursed for its expenses, Satra is entitled to reimbursement for expenses even in years in which no revenues were received. If no revenues were received from IBM in a particular year, Satra could carry forward, or accumulate, its $100,000 deduction to the subsequent year and add it to the $100,000 deduction applicable to that subsequent year. In other words, if no revenues were received in the first year and $250,000 were received in the second year, the Stern-Satra Agreement and the Expense Schedule would entitle Satra to deduct $200,000 in expenses prior to the distribution of any revenues to Stern (469-72A; 516A; 520-21A; 702-07A).

Stern contended that the expense deduction was to be non-cumulative—no expenses were to be deducted for a year when Satra received no revenues, and expenses were not to be carried forward from year to year. Therefore, if no revenues were received in the first year, and $250,000

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* As Learned Hand, J., has said, "appellate courts have untrammelled power to interpret written documents." *Eddy* v. *Prudence Bonds Corporation*, 165 F.2d 157, 163 (2d Cir. 1947), *cert. denied*, 333 U.S. 845 (1948). See also, *Stamicarbon, N.V.* v. *American Cyanamid Company*, 506 F.2d 532 (2d Cir. 1974).

were received in the second year, Satra would be entitled to deduct only $100,000 in expenses in the second year (146-48A; E91-92)

2. *Off-the-Top vs.* Pro Rata

In addition to the foregoing dispute, the parties were at odds as to whether the full amount of the first plateau of expenses was to be deducted from incoming revenues prior to distribution of any revenues to Stern, *i.e.* "off-the-top," or whether expenses were to be deducted from incoming revenues according to fixed ratios derived from the Expense Schedule, *i.e.* on a *pro rata* basis. Satra contended that expenses were to be deducted off-the-top—if $150,000 in revenues were received, $100,000 in expenses were to be deducted, leaving $50,000 of profits to be shared by Stern and Satra (516A; 520-21A). Stern contended that only 40¢ of every $1 of revenue received up to $[illegible]00 should be deducted for expenses (a 40% ratio), so that of $150,000 of total revenue, $[illegible]0 would be deducted as expenses, leaving $90,000 to be shared by the parties (148A).

P. The Findings by the District Court

The District Court found in favor of Stern on both issues described above, *i.e.* that the parties intended to deduct expenses on a non-cumulative, *pro rata* basis (36-8A; 53-5A). The District Court reached its result, however, by relying on only one oral conversation between Stern and certain of Satra's representatives prior to the execution of the Stern-Satra Agreement. It completely disregarded the written language of the contract, the overall circumstances surrounding the preparation of the contract and the Expense Schedule, and the unreasonable result produced by adopting Stern's interpretation of the Expense Schedule. In doing so, the District Court violated several basic principles of law controlling the construction of a

contract. If this Court now applies those principles of law and interprets the Stern-Satra Agreement, it will reach what Satra is confident will be a decision in its favor.

C. The District Court Erred by Completely Disregarding the Language of the Written Contract.

As stated previously, the District Court interpreted the operation of the Expense Schedule by completely ignoring the language of the written contract. This was in violation of the well-established principle of law that the express language used in a contract is of paramount importance in its construction, *Brandwein* v. *Serrano*, 72 Misc. 2d 95, 98, 338 N.Y.S.2d 192, 195 (Sup. Ct. Queens Co. 1972), and that such language is not to be ignored when seeking to arrive at the expressed intent of the parties, *River View Associates* v. *Sheraton Corporation of America*, 33 App. Div. 2d 187, 190, 306 N.Y.S.2d 153, 156 (1st Dept. 1969), *aff'd* 27 N.Y.2d 718, 262 N.E.2d 416, 314 N.Y.S.2d 181 (1970). Indeed, "[t]he relevant contractual intent is that expressed in the contract, even though it may not accord with the subjective intent of the parties," *Peripheral Equipment, Incorporated* v. *Farrington Manufacturing Company*, 29 App. Div. 2d 11, 13, 285 N.Y.S.2d 99, 101 (1st Dept. 1967).* Finally, " '[t]he rules of construction of contracts requires [the court] to adopt an interpretation which gives meaning to *every* provision of a contract or, in the negative, *no* provision of a contract should be left without force and effect'." (Emphasis added). *Peripheral Equipment, Incorporated* v. *Farrington Manufacturing Company, supra* at 14, 285 N.Y.S.2d at 102. Following these principles requires a finding that expenses should be deducted on a cumulative, off-the-top basis.

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* Satra believes, of course, that its interpretation of the Stern-Satra Agreement does indeed conform to the "subjective intent of the parties."

In the first instance, the intention expressed throughout the Stern-Satra Agreement is that Satra is to be reimbursed for its expenses in connection with servicing the IBM agreement, and that Stern is not to receive any revenues until *after* such reimbursement has occurred. This is made clear by a joint reading of several clauses of the agreement:

(1) "Your compensation will be 50 percent of gross revenues received from IBM and Stromberg-Carlson by Satra *after deduction of expenses on an annual basis as per attached schedule.*" (Emphasis added) (Paragraph IB, E7)

(2) "These commissions will be paid quarterly *after an amount equal to expenses has been recouped in each year.*" (Emphasis added) (Paragraph IB, E7)

(3) *All expenses* for the project will be advanced by Satra to be recouped out of earnings if any, . . ." (Emphasis added) (Paragraph IC, E7)

The District Court's ruling that expenses are to be deducted on a non-cumulative, *pro rata* basis is in bold contradiction to the general intent represented by all of the above clauses that Satra be reimbursed for expenses. The result of utilizing a non-cumulative approach is to deny Satra reimbursement for expenses incurred in any year in which there were no incoming revenues. Therefore, if no revenues were received for four years, Satra would lose reimbursement for the $400,000 of expenses the Expense Schedule contemplated it would incur over that four-year period. This is completely in conflict with the general intent of the agreement as reflected by the foregoing phrases.

A non-cumulative interpretation also violates (a) the express language of clause (1) that Stern is not to receive

any revenues until *after* deduction of expenses on an annual basis, (b) the express language of clause (2) that revenues are to be paid to Stern only *after* expenses have been recouped in *each* year, and (c) the express language of clause (3) that "*all* expenses" are to be recouped out of earnings. There is nothing in the relevant clauses of the Stern-Satra Agreement to even imply that anything less than *all* expenses are to be recouped by Satra, or that expenses are to be recouped only for years in which revenues were received instead of for *each* year, yet that is the interpretation that the District Court would follow.

A *pro rata* deduction of expenses similarly nullifies the express provisions of the contracts. Clauses (1) and (2) above provide that Stern is to receive revenues only "*after* deduction of expenses on an annual basis" and only "*after* an amount equal to expenses *has been* recouped in each year." For Stern to be paid a portion of every incoming dollar would be nothing less than a complete alteration of the above provisions to read that Stern may receive revenues "*during* [the] deduction of expenses on an annual basis" and "*while* an amount equal to expenses *is being* recouped in each year."

There is no question that Stern is an educated, sophisticated and knowledgeable individual. All of the problems in dispute could have easily been prevented by his insertion of a simple clause in the agreement that "Stern is to receive 40¢ of every $1 of revenue received from IBM up to $250,000." Neither these words, nor any similar words, were included in the contract. In the face of their conspicuous absence, and in the face of the language actually used by the parties, the District Court should not be permitted to so completely rewrite the agreement of the parties.

D. The District Court Did Not Consider All of the Circumstances Surrounding the Preparation of the Stern-Satra Agreement.

Although Satra claims that the deduction of expenses should be controlled solely by the express language of the Stern-Satra Agreement, Satra recognizes that if the Court believes the contract is ambiguous, the Court is entitled to refer to the circumstances surrounding the execution thereof to ascertain the intent of the parties. However, such reference must be to *all* of the surrounding circumstances, including the sense in which the words of the agreement were used and the relation and situation of the parties. *Mister Filters, Inc.* v. *Weber Environmental Systems,* 44 App. Div. 2d 639, 353 N.Y.S.2d 835 (3d Dept. 1974); *Morton L. Ackerman, Inc.* v. *Mohawk Cabinet Company,* 37 App. Div. 2d 655, 322 N.Y.S.2d 396 (3d Dept. 1971); *Tobin* v. *Union News Company,* 18 App. Div. 2d 243, 239 N.Y.S.2d 22 (4th Dept. 1963), *aff'd,* 13 N.Y.2d 1155, 196 N.E.2d 735, 247 N.Y.S.2d 385 (1964). In addition to the District Court's complete failure to relate such external circumstances to the express language of the contract,* the District Court erred by basing its decision on only *one* conversation between Stern and representatives of Satra, and by completely ignoring all other circumstances surrounding the parties and the execution of their agreement. A brief description of those other circumstances puts the situation in perspective.

From the very onset of their discussions, Stern and Satra intended to share in their relationship as equal partners. Stern and Oztemel both testified to this in connec-

* "Consideration of attending circumstances can never justify a construction of a contract of which the language is not susceptible." *McLean* v. *F. W. Woolworth Co.,* 204 App. Div. 118, 119-120, 198 N.Y.S. 467, 468 (3d Dept. 1923), *aff'd,* 236 N.Y. 612, 142 N.E. 305 (1923).

tion with their August 10th discussion (120-21A; 691A; 858-59A), and indeed the words "partnership" and "partners" were used in Stern's own draft of an agreement arising out of that discussion (E1-2; 1005-06A). This concept continued to the final offer extended to and accepted by Stern, for in Stern's own words, Alternative No. 1 of the August 31st offer (E7) meant that "I am a partner, I share equally in the revenues" (209A). The contention that Stern considered himself to be Satra's partner was never disputed at trial, and indeed, was vigorously propounded by Stern's own attorneys in their opening to the jury (102-03A).

In spite of the intended "equal partnership" relationship between the parties, the District Court reached a finding as to the deduction of expenses that gave Stern substantial benefits to the detriment of his so-called "equal partner." As described previously, a non-cumulative, *pro rata* application of the Expense Schedule would never allow Satra to be reimbursed for expenses in years in which no revenues were received, and would minimize its reimbursement for expenses in any year in which revenues were nominal. Such unreimbursed expenses could wipe out any profits Satra might hope to make on its arrangement with IBM,* while Stern, on the other hand, would be assured of receiving as profit (because Satra advanced all expenses) a portion of every dollar ultimately received by Satra. That result could not have been intended by individuals expecting to be equal partners.

The only evidence relied on by the District Court in deciding on a non-cumulative, *pro rata* deduction of ex-

* In the first two years in which Satra serviced the IBM account, it incurred expenses of approximately $415,000 (E100-01). According to the non-cumulative, *pro rata* theory of deducting expenses, Satra was permitted only $8,000 as reimbursement of expenses for those years. Based on the total revenues actually received in those years, Satra was awarded $39,000, giving them a loss of $375,000, and Stern was awarded pure profit of $31,000 (E82-90; 63A).

penses was an oral conversation on August 31st between Stern, Hanno Mott and William Herman, a conversation which did not even relate to the contract ultimately executed by Stern and Satra. As described previously, Stern testified that on August 28th, he accepted an offer extended to him on August 25th providing for the payment to Stern of $7,500 per month plus 25% of the revenues received from IBM. (This clearly did not follow the concept of "equal partnership".) Stern continued that on the morning of August 31st, Satra raised the subject of being reimbursed for expenses. An expense schedule was prepared *as an addendum to the August 25th offer,* and Stern, Mott and Herman discussed its application.

It was solely this August 31st morning conversation on which the District Court relied in interpreting the 50-50 partnership agreement reached on September 1st, even though Stern *admitted* that the only offer to which the conversation related was one made six days previously which was completely different in terms from the agreement which the District Court was seeking to interpret (165A; 391-92A; 1089A). The District Court's reliance on a conversation relating to the August 25th offer to interpret a subsequently executed contract completely different in concept cannot be said to be an analysis of all of the circumstances surrounding the execution of the agreement in question, and was a violation of sound legal principles of construction of contracts.

E. The District Court's Findings Produced an Unreasonable Result.

In seeking to ascertain the intentions of parties to a contract, a court, wherever possible, should give an agreement a fair and reasonable interpretation and should avoid arbitrary and capricious results. *Aron* v. *Gilman,* 309 N.Y.

157, 128 N.E.2d 284 (1955); *Tobin* v. *Union News Company, supra; Rush* v. *Rush*, 19 App. Div. 2d 846, 244 N.Y.S.2d 673 (2d Dept. 1963). As the Court stated in *Brown* v. *McGraw-Hill Book Company*, 25 App. Div. 2d 317, 269 N.Y.S.2d 35 (1st Dept. 1966), *aff'd*, 20 N.Y.2d 826, 231 N.E.2d 768, 285 N.Y.S.2d 72 (1967), when it rejected an interpretation of a commission contract which would have led to the conclusion that defendant entered into it knowing he would be exposed to substantial financial loss:

> "While it is true that people have made improvident agreements and that even an obvious disadvantage to one of the parties does not affect the validity of the contract, yet, in determining what the construction of the agreement should be, this is a factor. It is not to be assumed that people act unreasonably to their own disadvantage, and an interpretation which assumes that they so acted is not favored (citation omitted). 'Contractual obligations are fixed solely by the parties and the language of a business contract must be construed in the light of what a business man would reasonably expect to give or receive, to perform or suffer, under its terms' (citation omitted). 'In the transactions of business life, sanity of end and aim is at least a presumption, albeit subject to be rebutted' (citation omitted)." 25 App. Div. 2d at 320, 269 N.Y.S. 2d at 38.

Aron v. *Gilman, supra*, demonstrates a sane approach to the construction of contracts which should be followed in the present action. In that case, the New York Court of Appeals was faced with determining how income taxes of a corporation were to be treated for stock valuation purposes in the face of an agreement providing that such stock was to be sold at "book value . . . determined by the most recent audit." *Id.* at 160, 128 N.E.2d at 286. Defendants asserted that income taxes should be ignored in calculating book value because the "most recent audit," al-

though recognizing tax liability in the future, had not included specific amounts for taxes payable. The Court of Appeals rejected defendants' position, stating that ignoring income taxes until they were actually payable would mean an arbitrary, capricious and widely fluctuating purchase price, depending on the time of the last audit.

> "For example, if [the last] audit took place one day before the taxes became payable, by defendants' theory no income taxes at all should appear in the computation of book value. But if the audit should take place a few days later, book value would have suddenly dropped by an amount equal to the income taxes for the entire year. Such a result is manifestly unreasonable from both a practical and theoretical point of view." *Id.* at 163, 128 N.E.2d at 288.

Adopting a non-cumulative approach to the deduction of expenses produces a similarly capricious and fluctuating amount of expenses for which Satra would be entitled to reimbursement. For example, assuming a calendar year as the relevant period of measurement, if Satra incurred $100,000 of expenses in a given year and received revenues from IBM on December 31st of that year, there is no doubt that Satra could deduct from those revenues some, if not all, of that $100,000 for reimbursement of expenses before distributing any of the revenues to Stern. However, if those very same revenues were not received until January 1, Stern's (and the District Court's) construction of the agreement would cause Satra to lose all right to reimbursement of the previous year's expenses. Such a result is certainly unreasonable, arbitrary and capricious and cannot reflect the intentions of the parties.

Another persuasive case in the context of the present action and the legal principle under discussion is *Westbury Post Avenue Associates* v. *Great Atlantic and Pacific Tea*

Company, 46 App. Div. 2d 860, 361 N.Y.S.2d 377 (1st Dept. 1974). In that action, plaintiff lessor and defendant lessee were parties to a lease providing, *inter alia*, that the lessee was to reimburse the lessor for certain increases in real estate taxes. In a succinctly worded opinion, the Appellate Division of the New York Supreme Court rejected as absurd the lessee's contention that in any one year, it was to pay *only* the tax increase over the previous year, and that the increases of further preceding years were *not* to be carried forward as part of the new payment.

In the present action, the result reached by the District Court is tantamount to saying that Satra, in the context of reaching an equal partnership agreement designed by both parties to allow Satra to be reimbursed for expenses, knowingly agreed to forego such reimbursement for all years except those in which revenues were received.* This is particularly difficult to believe in the face of Satra's awareness that, even after the execution of an agreement with IBM, revenues might not be received for several years (472A; 706A). In short, the District Court's holding achieves an unreasonable result that could not have been intended by the parties, and indeed which no businessman could reasonably be expected to suffer. The District Court's holding should not be permitted to stand.

Based on all of the foregoing, Satra submits that the award of damages should be set aside, and that the District Court be directed to recompute damages by allowing expenses to be reimbursed to Satra on a cumulative, off-the-top application of the Expense Schedule.

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* As described previously, the actual result of this interpretation is to require Satra to go forever unreimbursed for the net loss of $375,000 which it sustained in the first two years of its servicing the IBM contract.

POINT III

The District Court Erred in Finding That the 1973 IBM Agreement Was a Renewal of the 1971 IBM Agreement.

Stern is entitled to a portion of the $16,667 monthly payments made to Satra by IBM pursuant to the 1973 IBM Agreement (E39-46) only if that agreement constitutes a renewal of the 1971 IBM Agreement (E25-33).* The District Court's finding that it *was* a renewal was incorrect as a matter of law, for comparing the two agreements demonstrates the material alteration in the relationship between Satra and IBM.

A. The Relevant New York Law

Under New York law, the determination of whether one contract is a renewal of another is to be made solely by analyzing the terms of the agreements in question, and is dependent on whether the terms, conditions and obligations of the agreements are the same. Absent an identity of provisions, the second agreement cannot be considered a renewal of the first. This is so even though the party claiming rights because of the new contract was not a participant in the negotiations leading to the new contract, and even though the general subject matter of the two contracts is the same. Under these rules of law, which were

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* The Stern-Satra Agreement provides that "[c]ommissions will also be paid during the term of any renewal of [an agreement between Satra and IBM] provided Stern continues to devote such time necessary to service the agreement." (Paragraph IB, E7)

The determination of the "renewal" issue does not affect Stern's rights to a portion of the $9,350 monthly payments made under the 1973 IBM Agreement, for those payments represent commissions earned by Satra under the 1971 IBM Agreement (990-92A). Satra recognizes that absent a reversal of the jury's verdict, subject to this Court's rulings on the operation of the Expense Schedule, and subject to other contingencies, Stern is entitled to a portion of the $9,350 monthly payments.

not followed by the Court below, the 1973 IBM Agreement is not a renewal of the 1971 IBM Agreement. *Tracy* v. *The Albany Exchange Company*, 7 N.Y. 472 (1852); *William Adam Schulz & Co., Inc.* v. *Realty Associates, Inc.*, 17 N.Y.S. 2d 924 (Mun. Ct. Queens Co. 1940); *Mitchnik* v. *Brennan*, 159 Misc. 287, 286 N.Y.S. 609 (Mun. Ct. Queens Co. 1936); *In re Hecht's Estate*, 138 Misc. 378, 245 N.Y.S. 629 (Surr. Ct. N.Y. Co. 1930); *Master Institute of United Arts, Inc.* v. *United States*, 167 F.2d 955 (2d Cir. 1948).

In *Mitchnik* v. *Brennan, supra*, the defendant rented a house to a third-party lessee procured through plaintiff broker, and defendant agreed to pay plaintiff his broker's commission for the term of the lease and on each renewal thereof. The initial lease was for a two-year period at an annual rental of $1,600, or approximately $133 per month. Prior to the expiration of the lease, the defendant and the third-party lessee cancelled their agreement, and the tenant remained on the premises on a month-to-month basis at a rental of $100 per month. Plaintiff sued for his commissions on the rent paid under the month-to-month tenancy, claiming that such tenancy was a renewal of the old lease.

In holding that the new agreement between the defendant and the lessee was *not* a renewal of the original lease, and that the broker was therefore not entitled to any commissions under the second lease, the Court referred specifically to the different term and rent in the two agreements. The Court reasoned that these differences caused the second agreement not to be a continuing of an old obligation nor an extension of a given contract for an additional period of time (necessary elements for a renewal, *id.* at 289, 286 N.Y.S. at 611), but in fact a substitution of one obligation for another. This was so in spite of the fact that the "gen-

eral purpose'' of the two leases was the same, *i.e.* the leasing of certain premises.

A similar result was reached in *In re Hecht's Estate, supra.* In that case, claimant lessor sought to recover rent from the guarantor of a lease and of any renewals thereof. The rent sought to be recovered was incurred under the last of several leases for the same premises under the theory that such lease was a renewal of the lease giving rise to the guarantor's obligations. The Court held, *inter alia,* that the independence of the various leases and their different terms prevented the lease in question from being a renewal of the lease to which the guarantee applied, and that the landlord therefore was not entitled to any rents under the guarantee.

Courts have also followed the ''identify of terms'' test in construing the application of covenants to renew. *Tracy* v. *Albany Exchange Company, supra,* and *Mitchnik* v. *Brennan, supra,* both stand for the proposition that covenants to renew which do not specify the right to insert new terms mean that the contract may be extended only under the *same* terms and conditions as were previously in effect. The implication is clear that an attempt to insert different terms and conditions would necessarily create a new agreement, thereby negating the application of a covenant to renew.

In *Master Institute of United Arts, Inc.* v. *United States, supra,* the plaintiff argued that he was not required to pay a statutory tax imposed by Section 1801 of the Internal Revenue Code on bonds and other instruments of corporate indebtedness, and renewals thereof, on the ground that the bond in question was not a renewal of a previously issued bond. Although the case turned on a ruling that under the statute, a tax could be imposed on modifications of bonds

other than renewals, the Second Circuit Court of Appeals affirmed the District Court's finding that the subsequent obligation effected such material changes in the original bond so as to constitute not a renewal, which involves only "little alteration in the rights of the parties," *id.* at 957, but a new and different undertaking.

B. The Errors of the District Court

In the context of the cases cited above and the facts of the present action, the District Court made several errors in finding that the 1973 IBM Agreement was a renewal of the 1971 IBM Agreement. In the first instance, the District Court reached its findings not by solely examining the terms of the two agreements in question, but by relying on parol evidence as to the circumstances surrounding the execution of the 1973 IBM Agreement, and by examining what the District Court felt was the intention of Stern and Satra in including the renewal provision in their agreement (39-41A). This was in error, for as demonstrated by the above cited cases, New York law permits only the examination of the terms of the agreements themselves as being probative of whether one agreement is a renewal of another. Indeed, by inquiring into Stern and Satra's unexpressed intent, the District Court is once again rewriting the contract between the parties in the face of an unambiguous term, *i.e.* renewal, used therein.

Secondly, the District Court incorrectly utilized what might be called a "general purpose" test in reaching its decision. This test was first enunciated by the District Court during the hearing on damages when, after recognizing that the Court had not yet studied the law on the subject, the following observation was made:

> ". . . it seems to me in a situation of this kind, as distinct from the one I referred to as the two party

> situation, that a key factor would be not only what the terms of the agreement were, that is in regard to payment and matters of that sort. But whether the second contract on the whole, if not exclusively, dealt with the same general subject matter as the first. Certainly that would seem to be a telling criteria." (945A)

It is apparent that in reaching its findings, the District Court followed its predisposition to the "general purpose" test. Without citing any law in support, the Court stated that:

> "[t]he inquiry then must be whether Satra was expected under the 1973 Agreement to perform essentially the same services for IBM as under the 1971 Agreement." (39-40A)

As seen by the cases cited herein, this "general purpose" test is simply not the law. If it were, the outcome of the cited cases would certainly have been different.* Furthermore, the District Court's "general purpose" test could, in effect, produce the untenable result of *every* subsequent contract between Satra and IBM being termed a renewal as long as any administrative, consulting or financial services are provided by Satra to IBM in connection with the Soviet market. Accordingly, this aspect of the District Court's findings should similarly be disregarded.

A third error was the District Court's examination of whether Stern intended to enter into an agreement "by which Satra could liquidate his rights merely by renegotiating [the compensation and term of the agreement] with IBM" (40A). This too was an erroneous inquiry premised upon a preconceived notion by the District Court:

> "[THE COURT]: The second point that I make and comment on what you said, that the issue of a third

* For example, each of the cited cases relating to two leases for the same premises would have held the second a renewal of the first, regardless of the differences in rents, duration or other terms.

> party's rights doesn't arise unless one or both of the other two parties proceed in bad faith might be correct, but I am not sure it's obviously correct. It would seem to me even if they proceeded in good faith but that they created a renewed contract, that third party beneficiary is entitled to his benefits." (945-46A)

In none of the cited cases did the court go behind the agreements in question to test whether the claiming party intended to have his rights terminated by the independent actions of other individuals. Similarly, in no case did the court decline to find one contract not a renewal of another merely because the party who stood to lose from such a decision was not a party to the renegotiated contract. This is particularly relevant where, as here, there is no evidence whatsoever that the 1973 IBM Agreement was entered into in bad faith or for any reason other than a *bona fide* business purpose. Finally, even though the District Court stated that "there is no evidence to support the conclusion that Stern thus placed his fate in Satra's hands" (40A), there was similarly no evidence that he did not do so. Indeed, nothing in Stern's agreement with Satra gave Stern the right to object to or participate in any modification or even cancellation of the 1971 IBM Agreement.

Citing only *Master Institute of United Arts* v. *United States, supra,* in support of its findings,* the District Court

* The District Court also cited, in the abstract, certain dictionary definitions of renewal to support its decision, but these should not be controlling in the face of more pertinent case authority. In addition, see *East Bay Union of Machinists, Local 1304* v. *Fibreboard Paper Products Corporation,* 288 F. Supp. 282 (N.D. Calif. 1968), *aff'd,* 435 F.2d 556 (9th Cir. 1970), where the Court stated that

> "[t]o renew . . . means to 'begin again' or 'continue in force' the old contract. Webster's International Dictionary, unabridged, p. 2109 (2nd ed. 1950). Once one of the parties has stated his desire to modify the *old* contract, that contract cannot obviously be 'renewed,' since there would in effect be a *different* or *new* contract." (Emphasis in original.) 285 F. Supp. at 287.

held that whether a second contract is a renewal of a first depends on " 'the extent of the modification,' and that the test, 'like many other legal standards is a matter of degree' " (40-1A). These references in the *Master Institute* case related not to whether one agreement was a renewal of another, but to whether a modification of a bond was sufficient in scope to warrant the imposition of a tax "as a new issue" under the language of Section 1801 of the Internal Revenue Code. *Id.* at 957. Rather, Judge Hand's test for a renewal as stated in that case is whether or not there is "little alteration in the rights of the parties." *Id.*

C. The 1973 IBM Agreement Materially Altered the Relations of the Parties.

Based on all of the foregoing, the only relevant inquiry which the District Court should have made, and which this Court should now make, in determining as a matter of law whether the 1973 IBM Agreement is a renewal of the 1971 IBM Agreement, is of the terms of the agreements themselves, the identity of those terms and the alteration of the rights of the parties caused by the second agreement. As will be shown below, the inquiry should result in a reversal of the District Court's finding on the issue of renewal.

The entire tone of whether the 1973 IBM Agreement is a mere continuation of the parties' rights and obligations under the 1971 IBM Agreement is set by the preliminary phrases in the later agreement. The first "WHEREAS" clause states that the parties "hav[e] determined that [*the 1971 IBM*] *Agreement is not in their best business interests* . . ." (Emphasis added) (E40) The first substantive provision states that "[t]he [1971 IBM] Agreement . . . is terminated and [IBM] and Satra relinquish any and all

claims either may have against the other, subject to the provisions of Paragraph 2(b) of this Agreement."* (E40) What better indication can there be that IBM and Satra were totally redefining their past relationship and were beginning completely anew?

The remaining provisions firmly establish this preliminary conclusion:

1. Satra's Obligations

Under the 1971 IBM Agreement, Satra was required to render such services as were necessary to consummate any barter or other financial transactions arising out of IBM's sale of products to the Soviet Union. Satra was also required to render administrative services such as providing office space, arranging introductions to Soviet officials and obtaining visas.

Under the 1973 IBM Agreement, Satra is required *solely* to provide administrative services and to act as a financial consultant. Satra is no longer required to consummate barter or other similar transactions, but merely has a right of first refusal with respect to those transactions, subject to the Soviet Union's prior approval of Satra's participation therein. If Satra desires not to participate in such transactions, it is obligated only to use its best efforts to find a suitable substitute.

2. Compensation

Under the 1971 IBM Agreement, Satra was to receive commissions of 3½% of IBM's sales of data processing equipment to the Soviet Union, 7% of IBM's sales of office

* Paragraph 2(b) preserves Satra's rights to commissions on a sale of IBM equipment made to the Soviet Union during the 1971 IBM Agreement. Satra recognizes Stern's right to a portion of such commissions.

products, and two payments of $25,000 to be charged against future commissions. This compensation was an all-inclusive arrangement for all services rendered under the 1971 IBM Agreement.

The 1973 IBM Agreement makes no mention of a commission arrangement. Indeed, Satra is to receive only a monthly payment of $16,667 for its administrative services. It is to receive a separately negotiated fee for barter or similar transactions *only* if such occur and Satra chooses to participate therein.

3. Duration of the Agreements

The 1971 IBM Agreement was to extend for five years and was cancellable by IBM after the third year only if annual sales did not exceed $50 million. The 1973 IBM Agreement is of indefinite duration, and is cancellable at will by *either* party after three years upon proper notice of termination. It is important to note that the 1971 IBM Agreement had *not* expired and was not cancellable by IBM at the time it was terminated and substituted by the 1973 IBM Agreement. Both Satra and IBM had rights and obligations which were abrogated by the 1973 IBM Agreement.

From the faces of the two agreements alone, it is apparent that the markedly different terms carry with them entirely different consequences brought about by changing circumstances between the parties. As the very language of the second agreement states that the parties determined that the first agreement *was not in their best business interests,* and as the alteration of the rights of the parties is so substantial, the 1973 IBM Agreement cannot, under the law and facts of the cases cited above, be considered a renewal of the 1971 IBM Agreement.

POINT IV

The District Court's Finding That Stern's Obligations Under His Agreement with Satra Required Only 15% of His Working Hours Is Clearly Erroneous.

As part of its rulings on the issue of damages, the District Court correctly held that the theory of mitigation of damages was applicable to the present action, and that the damages due Stern should therefore be reduced by an amount equal to that which Stern earned, or could have earned, as a result of his being freed from the performance of his obligations under the Stern-Satra Agreement (46-7A). To derive the appropriate deduction, the Court found that the fulfillment of Stern's obligations under his agreement with Satra would have required 15% of his working hours, and that therefore 15% of Stern's annual income earned after the termination of his relationship with Satra should be deducted from the total damages due Stern (47-9A).

Satra believes that the Court's finding of a 15% "mitigation factor" has no basis in fact and is clearly erroneous. Rather, the evidence is overwhelming that Stern was required to spend either all of his time devoted to performing his agreement with Satra, or at a minimum, so much of his time as would effectively preclude him from earning income from other sources. Any other finding is not only against the overwhelming weight of the evidence, but is internally inconsistent with and contradicted by other findings correctly made by the District Court.

In order to minimize the reduction of damages based on mitigation, Stern attempted to prove below that any services he was required to render to Satra were so insubstantial that the termination of his relationship with Satra did

not "free up" any significant amount of his time. He continued that the termination therefore did not provide him with any opportunity to earn monies he would not otherwise have been able to earn had he continued that relationship. The District Court rightfully rejected Stern's simplistic contention as not being supported by the evidence (47A). In doing so, it cited Stern's own testimony as demonstrative of the "significant services which [Stern] was expected to perform":

> "I was to exert my best efforts to see that there would be an agreement reached between IBM, Stromberg and Satra. I was to continue the discussions and negotiations between the parties.
>
> After agreements between the client and Satra, since I was a partner in the venture here, it didn't describe specific actions I was to perform, like if I were getting a salary to do this, but here I was to share in the revenues. Therefore, I was to exercise my initiative to assist wherever called upon, wherever I was able, to maximize the sales and profits. In particular, I was to continue to work with Satra, in helping to understand the needs of a technology-oriented firm, of the needs of the customer, the Soviets, in the use of the products, if I were able.
>
> And I would similarly be a communicator, the other way, help to explain why IBM had services Satra would be able to perform. Over and above this, Mr. Oztemel had made several suggestions to the effect he wanted to introduce me to the Moscow scene to see if I could pick up some of that knowledge." (362-63A; 48-9A)

At that point, without referring to any other evidence on the subject, the District Court found that the fulfillment of Stern's obligations would have required 15% of his working time (49A). However, other evidence in the record, combined with that cited by the Court, demonstrates

overwhelmingly that the 15% factor selected by the Court is clearly erroneous and without basis in fact.

The record is replete with reference to the substantial amount of time Stern was to have spent servicing the IBM account. Although the precise nature of Stern's services were undefined, Stern was to do whatever was necessary to service the IBM account from a technical standpoint (209-11A; 362-63A; 441-42A; 723A; 764-65A; 770A; 777A). Indeed, Stern was to carry 50% of the load in servicing the IBM account (723A), a concept wholly inconsistent with the "equal partnership" premise underlying the entire relationship between Stern and Satra. Stern even told Oztemel that Stern's involvement would be so extensive as to occupy him full time, and he requested at least two assistants paid by Satra to help him (712A). Although Satra would agree to this only if Stern took up residence in New York (712A), Satra did contemplate the necessity of individuals other than Stern participating in the project, for the Stern-Satra Agreement provided that "[a]ll personnel to be hired or assigned by Satra to the project will be Satra's sole responsibility." (Paragraph ID, E7). It is inconceivable that Satra would undertake the burden and expense of hiring other individuals to help service the IBM account if Stern, its joint venturer and partner, had free time on his hands.

Although Stern had decided that he did not want to move his family from California to New York (320A), he recognized that his time commitment to the project was so substantial so as to require him to maintain an apartment in New York and to undergo heavy expenses in commuting between New York and Los Angeles (320A; 396A; E7). Further, Stern was to have made several trips to the Soviet Union over a period of time so as to be able to properly

fulfill his obligations under the Stern-Satra Agreement (211A; 363A; 423A).

Perhaps the most telling evidence that Stern's time commitment on the IBM project would disrupt his business relations with others and strongly interfere with his earning capacity is Stern's overwhelming pre-occupation with the need to immediately receive income "in order to be able to live." From the beginning of negotiations with Oztemel, Stern voiced a concern that a pure joint venture relationship with Satra would not provide him with income to support his family:

> ". . . The issue was I could not or at the time did not want to make an offer of us operating as joint ventures since I was concerned about being able to finance my half of the effort, namely, the expenses I would need for travel and to—some kind of salary, so I might be able to support my family."
>
> Q. Did you express that to Mr. Oztemel at the meeting?
> A. Yes." (121A)

In addition to needing income to support his family, Stern envisioned the need to receive income to make up for the expenses he would incur in devoting so much of his time to the Satra arrangement.

> "A. We discussed the fact that my family and I have come to a firm decision we are not going to relocate the kids and things like that. So that I would have a heavy expense travelling back and forth [to California]. I would have an apartment here [in New York], and those would be expensive. We discussed that I would need some reasonable salary over and above those kinds of expenses." (320A; see also, 396A)

Stern's concern that his relationship with Satra would preclude his ability to earn income from other sources and would impose difficulties in his being able to support his

family continued to the very day of the final offer extended to Stern by Satra. That offer gave Stern two alternatives: a 50-50 arrangement burdened only by the Expense Schedule, or a combination of a monthly salary of $6,250 and 30% of the revenues to be received from IBM (E6-9). Stern testified that when the offer was made, the following conversation occurred:

> "Then he [Oztemel] made ready to sign and he looked up and he said 'I hope now you will take the pure 50/50 partnership with no financing by Satra.'
>
> "I answered 'By now it's become very, very complicated. I don't know.'
>
> He said, 'What don't you know?'
>
> *I said, 'Well, in the pure 50/50 sharing, I do not get the fee for my expenses and salary and what have you. I then have to look for a source of current income*—by current income I mean income every month or quarterly or what have you. I have to now look for a source of current income from our revenues from the clients.' "
>
> * * *
>
> THE COURT: *If I understand what you said, you did not know whether you could go for the 50/50 deal because you didn't know whether you'd be able to live.*
>
> THE WITNESS: Yes, but then I went further. *I said 'I need current income.* This new agreement you are offering, even for the 50/50 sharing, that is going to be reduced by the expense reimbursement schedule. I am not that worried reducing the commission by the expense reimbursement schedule because those are future income also, but *in order to be able to live, I have to look to current income, the retainers or the advances and I don't want those to be reduced by this expense reimbursement schedule.'* " (Emphasis added) (157-59A)

Stern's constant references to needing monies "to be able to live" are not the words of a man who has 85% of his working hours available and who would be able to earn during that time his normal consulting fees of $500 per day plus expenses (288A). Only an individual who would be occupied full-time and with no other source of income would be so desperate for current revenues.* It should be obvious from the foregoing that Stern was relying on his relationship with Satra to provide most, if not all, of his personal income. That is completely incompatible with the arbitrary finding of the District Court that Stern was to devote only 15% of his time to servicing the Satra-IBM Agreement and had 85% of his hours available for other employment, and that therefore only 15% of Stern's income should be deducted from damages on a theory of mitigation.

According to the terms of the Judgment, Stern may receive as much as approximately $350,000 for the five years which he otherwise would have spent performing under the Stern-Satra Agreement, or $70,000 per year. The logical extension of the District Court's use of a 15% mitigation factor is that as such $70,000 represents what Stern would have earned for only 15% of his working hours, Stern's total annual earning capacity is a staggering $465,000. That amount is particularly mind-boggling in light of the fact that Stern's actual adjusted gross income for 1972 and 1973 was approximately $22,000 and $21,000, respectively (1077-78A). Even if Stern worked for 50 weeks at $2500 per week (Stern's usual *per diem* on a five-day weekly basis), he could earn only $125,000 per year.

* The District Court recognized Stern's pre-occupation with a need for current income. In connection with rulings unrelated to mitigation of damages, the Court found that "Stern's primary concern—which amounted to an imperative for him—was to make sure that he would receive 'current income.' . . ." (43A).

The unconscionable result of the District Court's finding is to give Stern a tremendous windfall at the expense of his former "equal partner."

Consequently, the Court's use of a 15% mitigation factor is clearly erroneous, and should be replaced by the finding that Stern was required to spend all or substantially all of his time in performing under the Stern-Satra Agreement.

Conclusion

For the reasons stated herein, Satra respectfully requests this Court to (a) reverse the Judgment herein and to remand this action for a new trial or, (b) in the absence of such relief, to reverse the Judgment and remand this action to the District Court for computation of damages consistent with the findings requested to be made herein.

Respectfully submitted,

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Dated: New York, New York
February 2, 1976

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARVIN STERN, Plaintiff-Appellee and Cross-Appellant, -against- SATRA CORPORATION and SATRA CONSULTANT CORPORATION, Defendants-Appellants and Cross-Appellees.	Docket No. 75-7649 ACKNOWLEDGMENT OF SERVICE

The undersigned does hereby acknowledge the receipt of one copy of the joint appendix on appeal (four volumes) and two copies of the brief of defendants-appellants and cross-appellees, Satra Corporation and Satra Consultant Corporation, this 2nd day of February, 1976.

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Dated: New York, New York
February 2, 1976

Service of 2 copies of the
within brief is hereby
admitted this 2d day of
February 1976

Signed Alvin C. Hellerstein

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